THE EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV2008/0403

BETWEEN:

ELENA RYBOLOVLEVA

Claimant

and

DMITRI RYBOLOVLEV
XITRANS FINANCE LTD
RINGHAM INVESTMENT FINANCE SA
TREEHOUSE CAPTIAL INC

Defendants

Appearances:

Robert Levy and Oliver Clifton of Walkers for the Claimant
Robert Ham QC and Michael Fay along with Claire-Louise Whiley of Ogier for the 1st and 3rd Defendants
Nigel Tozzi QC and Andrew Thorp of Harneys for the 2nd and 4th Defendants

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2009: January 15th
February 18th

(Commercial Law – application to vary freezing injunction and disclosure orders obtained without notice (exparte) on the basis that it is oppressive – whether disclosure orders can be made with a wider ambit than freezing orders– whether court should hear defendant who is in contempt of court – power of court to vary order – principles to be considered)

JUDGMENT

Introductory

[1] FOSTER J. (Ag.): On the 29th December 2008 the Claimant ("Mrs. Rybolovleva") applied *exparte* to this court for a freezing order against the Defendants pursuant to Part 17.4 of the Civil Procedure Rules 2000 ("CPR 2000") and for an order for service out of the jurisdiction pursuant to Part 7.3(2) of CPR 2000 of the relevant pleadings on the Defendants. On 30th December 2008 the court granted both orders. The court here is concerned with the Freezing Order. The order

restrained the defendants until further order from taking steps to transfer, remove, withdraw or otherwise deal with the assets of the Second, Third and Fourth Defendants within this jurisdiction that are owned by them or substantially under their control. The Order further directed the Defendants inter alia to inform the Solicitors representing Mrs. Rybolovleva "at once" of all their assets in or outside of the British Virgin Islands (BVI) and to provide specific details and information about the transfer of any of the shares by the Defendants to any third party or parties and any other entity person or matter connected or related to the parties.

[2] The Second, Third and Fourth Defendants ("the Corporate Defendants") by Notice of Application filed on the 9th January 2009 and supported by the Affidavit of Phillip Kite applied to vary the Freezing Order granted on the 30th December 2008 on the ground that the order was unnecessary, oppressive and beyond any legitimate purpose of the freezing order. On the 12th January the First Defendant also applied to vary the freezing order on the ground that "it is excessively wide, unclear and oppressive." This application was supported by the affidavit of Helen Madeleine Ward. At the hearing of these applications, Counsel for the Corporate Defendants, Mr. Nigel Tozzi QC informed the Court that he no longer represented the Third Defendant and that Mr. Rybolovlev and the Third Defendant were now represented by Mr. Robert Ham QC. The substance of both applications is however the same and they have been dealt with accordingly. Mrs. Rybolovleva relied on her original two (2) Affidavits filed in the matter on the 29 and 30 December 2008 and a Third Affidavit filed on the 15 January 2009, the date of this hearing. Emily Lett, an Associate of the law firm representing Mrs. Rybolovleva in this jurisdiction, deponed to these affidavits. No objections were made.

[3] The Application by the Defendants although seeking to vary the Order reserved the right to argue at a later date that Mrs. Rybolovleva failed to show inter alia:

a) a good arguable case against the Corporate Defendants;

b) that the wife's claim against the Corporate Defendants or any assets held by them is proprietary in nature;

c) that the subject matter of the British Virgin Islands claim, namely assets held by the Corporate Defendants, were in real danger of dissipation.

Background

[4] Mr. Rybolovlev[1] and Mrs. Rybolovleva both aged 42 were married in Russia in 1987. They are both Russian Citizens, now resident in Geneva, Switzerland having resided there since 1995. They have 2 children born in 1989 and in 2001. During the course of their marriage they acquired substantial assets. In doing so Mrs. Rybolovleva gave evidence that she accompanied Mr. Rybolovlev to see a lawyer in Switzerland to incorporate companies which would be used as a vehicle to purchase items of art, furniture and a yacht on their behalf as their nominee. Those companies included a company called Xitrans Finance Ltd ("Xitrans") a BVI company the Second Defendant in these proceedings. The evidence before the court is that Xitrans is wholly owned by a trust established in Cyprus under the International Trust Law of 1992 of the Republic of Cyprus and that it owns all of the assets in Annexure A, B, and C to the Freezing Order and Treehouse Capital Inc ("Treehouse") a BVI company, the Fourth Defendant in these proceedings. Whilst Mrs. Rybolovleva does not know if she is a shareholder of these companies she alleged that she and Mr. Rybolovlev at all times made the decisions with regards to purchasing items of art.

[5] A third company was incorporated. That company is Ringham Investments Finance SA ("Ringham"), the Third Defendant, which Mrs. Rybolovleva believes may have been used by Mr. Rybolovlev to purchase some of the art collection that they acquired during their marriage. Ringham, it was disclosed, is a shell company which does not own and has never owned any assets. Mr. Rybolovlev is its director. In addition to the art and furniture purchases a yacht named "My Anna" was purchased in December 2007 in the name of Treehouse. Again, whilst Mrs. Rybolovleva does not know if she is a shareholder in this company she says that it was their intention that was a joint purchase for their use. Treehouse owns the yacht "My Anna" said to be valued at about €60,000,000.00, and a bank account.

[6] The evidence before this court is that the marriage has broken down and divorce proceedings have been issued by Mrs. Rybolovleva against Mr. Rybolovlev in the Tribunal of First Instance of the Republic and Canton of Geneva, Switzerland. The documents evidencing these proceedings are exhibited in the First Affidavit[2] of Emily Lett.

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[1] A self made billionaire who according to Forbes ranks 59 on the World's Billionaires 2008 and the 24th richest European.

[2] See pages 1-38 of exhibit "EGL 2"

[7] Besides the divorce proceedings issued in Switzerland, other proceedings have been issued by Mrs. Rybolovleva against Mr. Rybolovlev in England and Wales, Singapore, Cyprus and the United States of America and relevant Orders in those proceedings have also been exhibited in this case with the exception of the US proceedings where only the notice of proceedings was exhibited.[3] Mrs. Rybolovleva issued these proceedings as at the time of her marriage to Mr. Rybolovlev there was no pre-nuptial contract. Under Swiss Law she submitted, where there is no pre-nuptial contract all assets earned during the marriage fall to be divided equally on divorce. According to the affidavit evidence of Ms. Lett these assets were acquired since the parties' marriage in 1987.

[8] The essence of the English without notice Order was to freeze the assets of Mr. Rybolovlev which are in England and Wales, whether such assets are held in his name and whether or not they are owned solely or jointly. The Order refers to some extremely valuable property. The Order also provided for the mandatory obligation of Mr. Rybolovlev to provide to Mrs. Rybolovleva's Solicitors, full details of any bank accounts held by him within the English jurisdiction, in which he has an interest and any other assets, within the English jurisdiction which are in his name or in which he has an interest or over which he has control, whether directly or indirectly. This injunction was stamped the 29th December 2008.

[9] The Singapore Freezing Injunction was granted on the 31st day of December 2008, in the High Court of the Republic of Singapore. The Application was also made by an Exparte Originating Summons. The Order granted by the Singapore High Court prohibits Mr. Rybolovlev from dealing with his assets "up to the amount stated." No amount was stated in the Order. The Order also prohibited Mr. Rybolovlev and Xitrans from removing from Singapore twelve paintings by various artists such as Modigliani, Van Gogh, Picasso, Monet, Gauguin, Degas and Rothko.

[10] The Cyprus Freezing Injunction was granted on the 30th day of December 2008 and prohibits Mr. Rybolovlev from dealing with his shareholding in certain companies.

[11] In those proceedings, the assets frozen were within those respective jurisdictions, and the time period for the disclosure of information of those assets within those jurisdictions was in the instance of the English Order, at least seven (7) days.

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[3] See pages 1-18 of Exhibit "EGL 2"

[12] On the 29 December 2008 Mrs. Rybolovleva issued proceedings in the BVI, the purpose being to support the Swiss Court's primary management of the divorce proceedings and to protect her rights of ownership in the Corporate Defendants so that any assets within this jurisdiction may be secured. She claimed against the Defendants inter alia the following relief:

> "A. A Declaration that the Claimant is beneficially entitled to one half of the assets of the Claimant and the First Defendant situate or registered in the British Virgin Islands (which includes the shareholdings in the Second to Fourth Defendants), having petitioned for divorce and financial relief against the First Defendant in the Tribunal of first instance of the Republic and Canton of Geneva, Switzerland; and/or
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> B. A declaration that all assets held by the Claimant and the First Defendant situate or registered in the British Virgin Islands (which includes the shareholdings in the Second to Fourth Defendants), are matrimonial assets under Swiss law; and /or
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> C. A declaration that all assets held by the Claimant and the First Defendant situate or registered in the British Virgin Islands (which includes the shareholdings in the Second to Fourth Defendants), are available for distribution by the Swiss courts upon the divorce of the Claimant and the First Defendant; and/or
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> D. A declaration that the Second to Fourth Defendants are beneficially owned by the claimant and/or the First Defendant; and/or
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> E. A declaration that the Second to Fourth Defendants hold assets acquired by the Claimant and/or the First Defendant following their marriage; and/or
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> F. A declaration that the Second to Fourth Defendants hold their assets as bare trustee and/or nominee for the Claimant and the First Defendant or either of them; and
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> G. An order that the Defendant must not without the Claimant's consent of

further order of the Court:

(i) remove from the British Virgin Islands any of their assets which are in the British Virgin Islands; or

(ii) in any way dispose of, deal with, diminish the value of any of their assets which are in or registered in the British Virgin Islands;

H. such further order or relief that the court considers just; and

I. costs."

It is noted that there is no claim for world wide relief.

[13] The Statement of Claim was filed on the 9 January 2009 by virtue of the Order of Justice Olivetti dated the 30 December 2008, permitting Mrs. Rybolovleva pursuant to CPR 8.2 to issue and serve a Claim Form in these proceedings without a Statement of Claim and to serve the Statement of Claim in these proceedings by the 9 January 2009.

Issue

[14] The issue to be determined is whether or not the Freezing Order should be varied on the ground that it is unclear, excessively wide and oppressive.

Submissions by Counsel

[15] Mr. Ham QC on behalf of the First and Third Defendants submitted that paragraph 1 of the Freezing Order relates to freezing assets that are in or registered in the BVI whereas the disclosure of information under paragraph 8 thereof applies to assets whether in or outside the BVI thus making the obligation excessive as the disclosure required should not extend beyond the scope of the assets which are frozen by the injunction. In relation to paragraph 9 of the Order, Learned Queens Counsel submitted that this paragraph should be deleted as it is trite law that a respondent to an injunction must clearly know what it is he is being ordered to do and paragraph 9 falls foul of this requirement. He argued that it is unclear what is being ordered. He further stated that its assumed objective is not permissible in these proceedings as the disclosure requirement appears

to be an attempt by Mrs. Rybolovleva to obtain vast and oppressive disclosure in a forum outside the primary Swiss proceedings. He also submitted that paragraph 10 should be amended in light of paragraphs 8 and 9 and that paragraphs 11 and 12 should be deleted.

[16] Mr. Tozzi QC on behalf of the Second and Fourth Defendants submitted that the final sentence in paragraph 4 of the Freezing Order should be deleted as it is illogical as there is no restriction on the Defendants dealing with their assets outside the jurisdiction of the BVI. He also submitted that in granting orders such as those in paragraphs 8 – 12 of the Freezing Order (provision of information and disclosure of documents) it is important for the Court to ensure that the order does not impose an impossible or near impossible obligation on the Defendants, that the order goes no further than is strictly necessary and that the meaning of the order is clear. This he says is especially important where the court requires a defendant to do something failing which he may be liable to imprisonment or sequestration of property. Mr. Tozzi QC further submitted that having regard to established law paragraph 8 should be varied to include only assets within the BVI and that paragraphs 9, 11 and 12 should be deleted as it is simply an unwarranted "fishing expedition". In support of this argument he submitted that Mrs. Rybolovleva already knew that the assets of Xitrans and Treehouse were frozen in England and exparte disclosure orders are only justifiable where absolutely necessary.

[17] Mr. Levy, Counsel for Mrs. Rybolovleva submitted that the Order should not be varied as the Defendants are in contempt and should not be heard. He argued that Mrs. Rybolovleva has a proprietary claim to the assets of the Corporate Defendants under a trust and that she is at liberty to seek the court's assistance in securing the same within the BVI and outside the BVI. He further submitted that while paragraph 8 of the Freezing Order extends beyond assets presently situated in the BVI the disclosure obligation does not go beyond the claim but goes hand in hand with it in order to ensure the Freezing Order itself is effective and properly policed. Mr. Levy also submitted that paragraphs 9 – 12 of the Freezing Order should not be varied as Mrs. Rybolovleva is entitled to the information regarding assets which are beneficially owned by her and in which the Corporate Defendants have no beneficial interest whatsoever and that the court should exercise its discretion and permit Mrs. Rybolovleva to use the said information in order to secure and/or follow assets to which she is beneficially entitled through foreign proceedings if necessary.

Court's considerations

[18] Before considering the application to vary the Freezing Order I think it imperative at this point to deal with the issue of contempt raised by Mr. Levy. In his submission he sought to persuade the court to make an order debarring the Corporate Defendants from proceeding with their application until they had purged their contempt as no disclosure was made regarding the assets "outside of the British Virgin Islands" and as such the Corporate Defendants are in contempt of Court. . He referred to the case of Hadkinson v Hadkinson[4] where Romer L.J. said as follows:-

> "I would add in passing that an apology is no acceptable substitute for compliance with an order and will not in any circumstances be regarded in itself as a purging of contempt. Nor has the mother in any way, as I think, by virtue of any exception to the general rule or otherwise, shown that, notwithstanding her continuing contempt of court she should be allowed to be heard in support of this appeal, and by parity of reasoning she should not in my opinion, have been heard in opposition to the father's application in the court below."

[19] Mrs. Rybolovleva has not instituted proceedings for contempt of court in accordance with alleged breaches of paragraphs 8 and 9 of the Order. And rightly so.

[20] Counsel for the Defendants has argued that they have applied to vary the Freezing Order and come within the exception. They both relied on Gee on Commercial Injunction, 5th Edition at para. 19.076 which states as follows:-

> "If a Defendant is in contempt of Court in respect of compliance with an order, the question may arise whether the court will refuse to hear the party in contempt until after he has purged that contempt. Previously there had been a tendency to articulate a general rule refusing to hear a party in contempt subject to categorized exceptions. This has given way to the exercise of a discretion not to hear based on principle. This discretion has to take into account the right to a fair trial guaranteed under Art. 6 (1) of the European Convention on Human Rights. The general principles which apply are:
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> ...
>
> (4) The contemnor is not to be precluded from defending himself in the proceedings (e.g. by appearing to resist an interlocutory application made by another party or by himself at the trial).
>
> (5) The contemnor is not to be precluded from making an application or

[4] [1995] 2 ALL ER 567 at page 571

> advancing an appeal in the action for the purpose of seeking to set aside the very order in respect of which he is in contempt…"

[21] Mr. Tozzi QC further pointed out that the judgment of Lord Denning in Hadkinson was approved in X Ltd v Morgan Grampian (Publishers) Ltd and others [1991] 1 A.C. 1 at page 46 where it was stated that:-

> "It is a strong thing for a Court to refuse to hear a party to a case and it is only to be justified by grave consideration of public policy. It is a step which a Court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would refer to what Sir George Jessel MR said in a similar connection. in Re Clements, Republic of Costa Rica v Erlanger (1877) 46 L.J. Ch. 375, 383: *'I have myself had on many occasions to consider this jurisdiction, and I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of jurisdiction.'* "Applying this principle, I am of the opinion that the fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed." (emphasis mine)

[22] I have not found that the Corporate Defendants are in contempt of Court. If I am wrong in this finding then in all the circumstances of this case, the granting of the Freezing Order in the absence of the Defendants, the fact that the application before me is an application by the Defendants to vary the Freezing Order in respect of which the Claimant alleges that they are in contempt and additionally there is no evidence that the alleged disobedience (if it continues) impedes the course of justice in this matter and along with the reasons which I have given in this case and in the interests of justice I would not exercise my discretion not to hear the Corporate Defendants. There is also no suggestion of contempt against the husband.

Law on Freezing Orders

[23] CPR 2000 Part 17.1(1)(j)[5] provides for the granting of Freezing Orders. It is usually made where a

[5] It provides that the court may grant interim remedies, including a freezing order, restraining a party from dealing with any of its assets whether located within the jurisdiction or not, or from removing from the jurisdiction assets located here.

defendant has no assets within the jurisdiction or has assets within the jurisdiction and there is a real risk that those assets will be dissipated or be removed from the jurisdiction. The purpose of such orders is to restrain a defendant from disposing of or dealing with his own assets and to ensure that a fund will be available within the jurisdiction to meet any judgment obtained against a defendant. The court's jurisdiction to grant such relief stems from s. 24(1) of the West Indies Associated Supreme Court (Virgin Islands) Act. This section provides as follows: -

> " 24. (1) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just".

[24] The governing principles[6] for the grant of freezing orders are well settled and have been adopted in our jurisdiction.[7]

Power of court to vary orders

[25] It is common ground that the Court under CPR 2000 Part 11.16 has the power to set aside or vary an order made on application without notice. Such applications are to be made not more than 14 days after the date on which the order was served on the respondent. However to vary an order it must be shown that there was some material change in circumstance or that the judge who made the order was misled as to the factual position before him.

[26] The Defendants all submit that the Freezing Order granted extends beyond the claims made by Mrs. Rybolovleva. The arguments are that:

(a) the Claim Form refers to freezing assets within the jurisdiction of the BVI;

(b) the Statement of Claim refers to freezing property within the jurisdiction of the BVI, and

(c) the "freezing" part of the Order restricts the Defendants from removing from the BVI or in any way dispose of, deal with, or diminish the value of any of the assts of the Defendants

[6] Mareva Compania Naviera SA v International Bulk Carriers SA (1975) 2 Lloyd's Rep. 509
[7] IPOC International Growth Fund Limited v. LV Finance Group Limited and Others BVI Civil Appeal Nos. 20 of 2003 & 1 of 2004

which are in the BVI or registered in the BVI.

[27] The Claim Form, Statement of Claim and paragraphs 1 and 2 of the Freeing Order are all consistent with each other. The argument is that the "disclosure" obligations of the Freeing Order are inconsistent with the Statement of Claim, the Claim Form, the application for the Freezing Injunction and paragraphs 1 and 2 of the Order. The "disclosure" obligations of the Freeing Order are in paragraphs 8 and 9 thereof.

[28] At this stage, I now consider the hearing before Justice Olivetti on the 30th December 2008. So urgent and so rushed were those proceedings that the application on behalf of Mrs. Rybolovleva was presented without a Skeleton Argument. Apologies were given and understandably accepted. It is notable that the reason for this was attributed to Counsel having to have his "seasonal rest" broken. It was the period between Christmas and New Year and the court vacation.

[29] During the course of the hearing of these *inter-parte* applications before me, the Court did not have the benefit of the transcript of the proceedings held before my sister Judge *ex-parte*.

[30] Since the reservation of this judgment the transcript has been brought to my attention. The transcript is a record of the entire *ex-parte* proceedings. It is a record that ought to have been properly before the Court at the hearing of these *inter-parte* applications. The hearings of these applications are simply a consideration now of what transpired earlier in the absence of the Defendants. Every effort should be made to always have before the court at the With Notice or *inter-parte* hearing a full and complete record of the proceedings earlier held *ex-parte*. This is for the purpose of affording the Court and a defendant as accurate as can be a full and complete consideration of the earlier proceedings held in the absence of a defendant. As the transcript is simply a record of those proceedings which invariably is subject to further consideration *inter-partes*, I can see no reason for not considering them, unless there is a claim that they are not accurate or maybe tainted. No such allegation or objection is made in this case.

[31] The transcripts of the *ex-parte* proceedings are instructive. In an *inter-partes* hearing following an *ex-parte* hearing, the Court is often required to perform the task of deciding whether to vary or discharge an Order by endeavoring to ascertain what the outcome would have been if the defendant was present during the *exparte* hearing to present his case. The transcript, the Skeleton

Argument, or the note taken by Counsel during the *exparte* hearing are to assist the Court in the performance of this task. It is settled that there is a strict duty imposed on the Applicant during a Without Notice Hearing to provide to the Court full and frank disclosure of the case before it. There is the further settled principle that Counsel must present to the Court the case the Defendants would bring in the event they had the opportunity of being present to give their arguments. In this case we had only the note taken by the Claimants of the hearing *ex-parte*.

[32] During the course of the *ex-parte* hearing on the 30 December 2008, whether by the note taker or the transcript, there is no proper reference to a consideration by the Court of the draft order. There was but one sentence devoted to the "disclosure" parts of the draft order. The case presented was in the terms of the application and the Claim form. The application for the Freezing Order made *exparte* was granted in the following terms:-

> "1. Until the return date, or further order of the court in the meantime, the Defendants must not:
>
> (a) remove from the British Virgin Islands any of their assets which are in the British Virgin Islands; or
>
> (b) in any way dispose of, deal with, or diminish the value of any of the assets of the Defendants which are in the British Virgin Islands or registered in the British Virgin Islands.
>
> 2. Paragraph 1 (above) applies to all of the Defendants' assets, whether or not they are held in their own name and whether or not they are owned solely or jointly. For the purpose of this order the Defendants' assets include any asset which he, it or they have the power, directly or indirectly, to dispose of or deal with as if it were his, its or their own. The Defendants are to be regarded as having such power if a third party holds or controls the asset in accordance with his or their direct or indirect instructions."

[33] This was the extent of the application. It was not an application for a Worldwide Freezing Injunction. During the consideration of the *ex-parte* application by my sister Judge and before any consideration of the actual draft Order before the Court, this Court granted the "freezing injunction."

It must be taken that the Judge had addressed her mind to the application before her and was indeed addressed on the application. However, Her Ladyship specifically asked Counsel whether there was anything in particular he needed to draw her attention to. The records, both the transcript and the note reveal that the disclosure obligations in the draft Order were not adequately dealt with, but were simply glanced over. Because of the vast divergence between the "freezing" part of the Order and the "disclosure obligation" it was incumbent on Counsel to specifically and clearly draw the Courts attention to the divergence between paragraphs 1 and 2 and paragraphs 8 to 10 of the draft Order. This was not done.

[34] Likewise nowhere in the note or the transcript is there a reference to the last sentence in paragraph 4. Paragraph 4 provides:- "This order does not prohibit each Defendant from spending $100,000 from assets within the British Virgin Islands towards their ordinary business expenses and a reasonable sum on legal advice and representation. But before spending any money the Defendants must tell the Claimant's legal representatives where the money is to come from."

[35] The Courts attention was not drawn to the fact that the disclosure obligations in paragraphs 8 and 9 were much wider than the Freezing Order in paragraphs 1 and 2. Indeed proceedings in other jurisdictions between the parties were brought to the Courts attention. In those proceedings, worldwide freezing orders and worldwide disclosure orders were not made. If the Defendants were present during the *exparte* hearing, they would have addressed the court on the apparent discrepancy between the application made and the terms of the disclosure paragraphs of the draft order. In "urgent" and rushed *exparte* hearings such as these, made at very short notice, accompanied by hundreds of documents, it is Counsel's duty to the court to specifically point out the material aspects of the case that may have an influence on the court exercising its discretion whether to grant the injunction or not. It is argued that the form of the Freezing Order and the disclosure obligations in it are unprecedented before the Court. Indeed, no similar Order in another case was presented to the Court. In the circumstances I am of the view and I do find that if my sister Judge's attention was specifically drawn to the discrepancies as highlighted above she would have granted an Order different to the freezing order in this case.

[36] Mr. Levy argued that by virtue of CPR 17.1(1) (e) the "disclosure" Order should remain and not be

varied. CPR 17.1 (1) (e) provides as follows:-

the Court may grant interim remedies including:-

> *(e) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order.*

And CPR 17.1 (1) (j) provides as follows:- *the Court may grant interim remedies including an order (referred to as a "freezing order") restraining a party from dealing with any asset whether located within the jurisdiction or not.*

[37] The claim before the Court concerns assets which are in the BVI or which are registered in the BVI. The relevant property therefore means property which is the subject of this claim or in relation to which any question may arise in this claim which is in the BVI or which is registered in the BVI. The relief claimed against the Defendants is therefore limited to assets within the BVI. There was therefore no justification for an order to have been made that is wider than the claim before the Court and indeed wider than the application for the freezing order made. Indeed Counsel in his Skeleton Arguments recognized that an application for a worldwide injunction was not made but stated at paragraph 9, page 4 of his Arguments "Furthermore, it is important to note that the Claimant may yet [emphasis mine] apply to extend the ambit of the interim relief granted to her by the Court. The common thread running through the application of all the Defendants is their unwillingness to provide information regarding assets which are not situated in the British Virgin Islands. This strenuous objection not only gives rise to serious concerns as to the underlying motivation of the Defendants but overlooks the nature of the Claimant's claim and the fact that she is entitled to apply [emphasis mine]:

> (i) for a worldwide Freezing Order; and
> (ii) for disclosure of information regarding assets where ever they may be situated."

[38] Mrs. Rybolovleva did not apply for a worldwide Freezing Order. I make no comments concerning this entitlement or otherwise but emphasise that no application was made and indeed no claim was made for a Worldwide Freezing Order.

[39] Paragraph 8 provides: - "The Defendants must inform the Claimant in writing at once of all their assets whether in or outside the British Virgin Islands and whether in their own names or not and whether solely or jointly owned, giving the value, location and details of all such assets (the Defendants may be entitled to refuse to provide some or all of this information on the grounds that it may incriminate them); and"

[40] Mr. Rybolovlev and the Corporate Defendants complain of the requirement in the Order for them to inform Mrs. Rybolovleva in writing "at once" of all their assets, giving the value, location and details of all such assets. The Corporate Defendants who were served on the 30 December 2008 and during the holiday period between Christmas and New Year, complain that the requirement to inform "at once" is a "near certain impossibility." Phillip Kite on behalf of the Corporate Defendants in his Affidavit evidence complains that "having regard to the nature of the assets, including valuable works of fine art and prestige furniture, it is a difficult, costly and a time consuming process to set about obtaining accurate valuations of these assets, especially when one considers that the values of these high-end objects could have diminished significantly over the last 6 or 12 months, given the worldwide economic conditions and the diminution in the disposable incomes and numbers of people and institutions who would be wealthy enough to provide demand for such items".

[41] Counsel for Mrs. Rybolovleva responded by submitting that such Orders are not uncommon. Indeed the precedent of such Freezing Orders here utilized the words "at once" or "immediately". The Corporate Defendants by letter dated 12 January 2009 and addressed to the Solicitors for the Claimants disclosed the information required of them.

[42] Was the "at once" requirement a near certain impossibility? Gee op. cit. answers this question. At para. 22.015 where he states that:–

> "the standard form orders provided under the 1996 Practice Direction[8] required the defendant to give the information in writing to the plaintiff "at once". This form of disclosure order was criticized by the Court of Appeal as unduly draconian. An order which imposes an unrealistic time limit for compliance should not be made because it will place a party in breach of it even when he wished to obey it. The disclosure order ought to have a reasonable time limit in it. The requirement that a defendant disclose all his assets immediately will almost inevitably result in the

[8] Practice Direction (Mareva Injunctions and Anton Piller Orders: Forms) [1996] 1 W.L.R. 1552

defendant being in breach of it."

[43] The case of Oystertec Plc v Paul Anthony Davidson[9] is instructive on this point. Patten J had this to say at para. 11 "...judges who are asked to make orders of this kind, particularly where they are made (as in most cases) on a without notice basis, need ... to have firmly in mind what is a realistic timetable for compliance, having regard to the scope of the information and the range of document which the respondent is required to produce. It is not satisfactory to impose an almost impossible deadline simply on the basis that the respondent, if in difficulties, can always apply to the Court for a variation of the order. Some of the respondents may not have immediate access to legal advice, and failure to appreciate the implication of not complying within the time limits prescribed by the order may have extremely serious consequences."

[44] Hence the usual form of order contained in the Practice Direction on interim injunction – Provision of Information should be worded as follows, of course modified as appropriate in any particular case:-

> "Unless paragraph (2) applies, the Respondent must [immediately] [within hours of service of this order] and to the best of his ability inform the Applicant's solicitors of all his assets [in England and Wales] [worldwide] [exceeding £ in value] whether in his own name or not and whether solely jointly owned, giving the value, location and details of all such assets.
>
> If the provision of any of this information is likely to incriminate the Respondent, he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondent liable to be imprisoned, fined or have his assets seized.
>
> Within [ ] working days after being served with this order, the Respondent must swear and serve on the applicant's solicitors an affidavit setting out the above information." See Gee at para. 22.014

[9] [2004] EWHC 627 (Ch) at para. 11

[45] I agree that in the circumstances of this case, taking into consideration the "holiday period" between Christmas and New Year and having regard to the words of Patten J the "at once" requirement in the Freezing Order was too onerous. However, I do not agree that the "values" to be disclosed would have to be "accurate values" and that the values disclosed could have been the prices those assets were purchased for. Because of the significant value of these assets, I am sure that their identity and location would be readily ascertainable and available to the Defendants. Accordingly, paragraph 8 of the Freezing Order is varied to read as follows:

> "The Defendants must inform the Claimant within ten days in writing pursuant to paragraph 10 of all their assets in the British Virgin Islands or assets registered in the British Virgin Islands, whether in their own names or not and whether solely or jointly owned identifying those assets and giving their location and values."

[46] Paragraph 9 of the Freezing Order provides: - "The Defendants must disclose to the Claimant, or the Claimant's solicitors, copies of all documents (including any written, electronic or digital matter of any description) which are in their custody, possession or control which are in relation to the following parties or matters:

a. any transfers of any of the shares by the Defendant to any third party or parties, including without limitation in relation to the proceeds of any such transfers; and

b. any other entity, person or matter connected or related to the abovementioned parties or matters."

[47] And the requirement to disclose the information in writing was followed in the Freezing Order at paragraph 10 where it provided:- "The information which is required to be produced under paragraphs 8 and 9 of this Order is to be provided in an affidavit sworn by the First Defendant and a director of the Second, Third and Fourth Defendants and exhibiting all the documents which are produced in accordance with this Order. These Affidavits are to be filed with the Court and served on the solicitors for the Claimant within 14 days after service of this Order."

[48] The Corporate Defendants complain that paragraph 9 is poorly drafted. They complain that the

requirement imposed by paragraph 9(b) could, on one view, be said to extend to every single document in the custody, possession or control of each of the Defendants. They argue that the paragraph leads to the absurd result that each Defendant has to disclose every single document in his custody, possession or control, as every such document will be, in some way, related to other persons or entities that are themselves related to the Defendant giving disclosure.

[49] At the hearing of the application it was concluded by Counsel for Mrs. Rybolovleva that the reference to "shares" in paragraph 9 (a) of the Order should have read "assets." Counsel also conceded that the drafting of this paragraph was not what it should have been.

[50] The arguments advanced on behalf of Mrs. Rybolovleva in response to the Corporate Defendants complaints of paragraph 9 are not very strong. Indeed in Learned Counsel's Skeleton Arguments, he devoted nothing to this argument save to say that it should have been clear that "assets" should have been inserted in paragraph 9 instead of "shares". In his arguments before the Court he argued that Mr. Kite did not state what those difficulties may be in providing the disclosure ordered.

[51] Mr. Levy argued that the disclosure obligation in the Freezing Order does not go beyond the Claim, but goes hand in hand with it in order to ensure that the Freezing Order is effective and properly policed. Counsel argued further that the terms of the Freezing Order required the provision of information in relation to assets which are not in the jurisdiction and that whilst it is not accepted that the ambit of the freezing and disclosure relief are inconsistent the court in its discretion can make a disclosure order with a different ambit to that of the freezing relief. To support this argument Learned Counsel relied on the case of Derby & C Ltd v Weldon (Nos. 3 and 4).[10] However the Claim (as presently formulated) is made in relation to the assets of the Defendants situate in or registered in the BVI. It is noted that the "Freezing" part of the Order in paragraph 2 and the claims in the Claim Form and the Application for the Freezing Injunction refer to assets which are in the BVI or registered in the BVI.

[52] Mrs. Rybolovleva claims that the Corporate Defendants were incorporated for the purposes of purchasing and/or holding assets on behalf of her and her husband, hence the Corporate Defendants hold their assets as nominees for, or upon trust for her and her husband. She stated that she does not know whether she is or has been a shareholder in the Corporate Defendants.

[10] [1989] 1 All ER 1002

Her evidence by way of Emily Lett's Affidavit details the purchase of these assets by the Corporate Defendants. The issue of her beneficial interest or otherwise in these Corporate Defendants and their assets is yet to be determined in the divorce proceedings in Switzerland and according to Swiss Law. Mrs. Rybolovleva argues that the proprietary claims made by her are not denied by the Defendants.

[53] The disclosure aspects of the Freezing Order are mandatory in nature, with severe sanctions. It is a recognized principle that any Freezing Order or Injunction generally must be written in clear and unambiguous terms. The Defendant must know exactly what he must and must not do. If the language of the Restraining Order is ambiguous, contempt proceedings will not succeed. Gee puts it succinctly at paragraph 4.001:- "there is the general principle that an order must be expressed in unambiguous language so that the defendant knows exactly what is forbidden or required by the order of the court. Contempt proceedings will not succeed when the order is unclear or ambiguous."

[54] I agree with Mr. Levy that disclosure orders go hand in hand with a freezing order to ensure that it is effectively policed. The learned authors of The Caribbean Civil Court Practice puts it thus at Note 14.20 – Injunction: Freezing Injunctions: Ancillary Orders

> "There are various ancillary orders which may be made to assist the purpose of the freezing injunction such as, notably, an order for the disclosure of assets and their location. The 'freezing' part of the order may well be combined with any other of the items of relief provided in CPR 17 (for instance, the provision of information). The Court will usually be cautious not to order wider disclosure than is reasonably necessary for the efficacy of the order or for the protection of the applicant. It will have regard to the overriding objective."

[55] I however do not agree with his argument that disclosure orders can have a wider ambit than the Freezing Orders. Contrary to Mr. Levy's view Derby did not answer that question. The Court of Appeal left open the question whether a disclosure order can have a wider ambit than the Mareva relief. It was stated in that case as follows:

> "It may be open to argument in some future case that in certain circumstances a discovery order can be made with a wider ambit that the Mareva injunction to which it is ancillary. As at present advised, however, I remain of the opinion which I expressed in Ashtiani v Kashi [1986] 2 All ER 970 at 980, [1987] QB 888 at 905 that the discovery order, if made at all, should not go further than the injunction. The

> basis of the jurisdiction to make an order for discovery was examined by this court in A J Bekhor & Co Ltd v Bilton [1981] 2 All ER 565, [1981] QB 923.
>
> It was held by the majority of the court that the order for discovery, being ancillary to the Mareva injunction, should not go beyond the ambit of the injunction. I do not find it necessary in this case to consider further whether, and, if so, in what circumstances, there may be exceptions to this general rule. I would only urge that in this field the court should scrutinize very carefully any submission that its powers are circumscribed more narrowly than the justice of the case demands." [11]

[56] Having read the Skeleton Arguments of all the parties in this matter, and having considered their oral arguments, I am of the view that paragraph 9 of the Order is too wide, unclear and ambiguous. This part of the Order imposes a mandatory obligation on the part of the Defendants with severe penalties in the event of its non-compliance. No Order should be too general or too wide. It should be written in clear and specific language. The Defendants must know exactly what they should do. The Defendants should not be obligated to do something within a time period which is unrealistic or near impossible. The precise nature of the obligation imposed on a defendant is particularly so when the injunction is mandatory. This is because a defendant does not have the option of refraining from acting when he is obliged to do so. Having regard to the mandatory obligations imposed on the Defendants, and having regard to the admitted poor drafting of this clause, and the requirement for precision in Orders such as this one, I would vary paragraph 9 of the Order by deleting it. Paragraph 10 would therefore be amended by deleting the reference to paragraph 9.

[57] Paragraph 11 provides:- "The Claimant is entitled, on giving 7 days' written notice to the Defendants as the case may be, to inspect the original documents which are held by the Defendants and disclosed pursuant to the terms after service of this Order." Having regard to my ruling on paragraphs 9 and 10, paragraph 11 is deleted as there is no longer a necessity for it as a consequence.

[58] Paragraph 12 of the Order concerns the use of the documents disclosed in accordance with the disclosure obligations. Paragraph 12 provides:- "The Claimant shall not without leave of this Court seek to use the documents produced pursuant to this Order in legal proceedings commenced outside the jurisdiction of the Court, save in connection with the divorce and financial relief proceedings between the parties in Switzerland and in proceedings between

[11] [1989] 1 All ER 1002 at page 1021 Neill LJ

the Claimant and the First Defendant dealing with matrimonial assets in England and Wales, Singapore, Cyprus and the United States of America." This judgment has limited the Freezing Order to assets registered and/or located within the BVI. In the event the Claimant wishes to use documents disclosed by virtue of this Freezing Order in any other proceedings then the leave of this Court should be first obtained. I have amended paragraph 12 accordingly.

Conclusion

[59] For the reasons given, I would vary the Order granted by my sister Judge Olivetti in the following terms:-

(a) The last sentence of paragraph 4 of the Order is varied to read "But before spending any money from assets within the British Virgin Islands, or from assets registered in the British Virgin Islands the Defendants must tell the Claimants legal representatives where the money is to come from."

(b) Paragraph 8 of the Order is varied to read "The Defendants must inform the Claimant within ten days in writing pursuant to paragraph 10 of all their assets in the British Virgin Islands or assets registered in the British Virgin Islands, whether in their own names or not and whether solely or jointly owned identifying those assets and giving their location and estimated value."

(c) Paragraph 9 of the Order is deleted.

(d) Paragraph 10 of the Order is varied to read "The information which is required to be produced under paragraph 8 of this Order is to be provided in an affidavit sworn by the First Defendant and a director of the Second, Third and Fourth Defendants and exhibiting all the documents which are produced in accordance with this Order. These Affidavits are to be filed with the Court and served on the solicitors for the Claimant within 14 days after service of this Order."

(e) Paragraph 11 of the Order is deleted.

(f) Paragraph 12 of the Order is varied to read "The Claimant shall not without the leave of this Court seek to use the documents produced pursuant to this Order in legal proceedings

commenced outside the jurisdiction of the Court."

(g) Costs reserved.

[60] I am thankful to Counsel for all the parties and for their concise and excellent Skeleton Arguments and presentations before this Court. The presentations were extremely useful in assisting the Court in arriving at its decision.

……
Peter I. Foster
High Court Judge (Ag.)
British Virgin Islands